Mandatory bill and keep only for ISP-based traffic will be unjustly & unreasonably discriminatory

The FCC consistently has classified and treated ESPs/ISPs as unregulated end users, not carriers.

Section 64.7 702(a) of the FCC's rules: ESPs "are not regulated under title II of the Act."

Section 69.2(m) of the FCC's rules: an end user is any customer of telecommunications service that is not a carrier.

ISPs utilize the local network in the same way as other local business end users.

Other end users of inbound telecommunication services includes call centers, credit card validation centers, travel reservation agencies, home shopping networks, call-in radio shows, ticket outlets, pizza delivery stores, taxicab companies, etc.

The FCC cannot lawfully single out ISP traffic for differential treatment.

Section 202(a) of the Communications Act of 1934, as amended, forbids "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services, directly or indirectly, by any means or device…."

Section 201(b) prohibits, and declares unlawful, any unjust or unreasonable "charges, practices, classifications and regulations…"

Mandatory "bill and keep" would further block the CLECs' ability to provide local service

Through their control over last-mile facilities, the ILECs have successfully foreclosed the CLECs from providing POTS service to residential and small business customers. Contrary to suggestions by some ILECs (Qwest Roadmap at 16-18), CLECs do not intentionally restrict their operations -- they serve customers where they are able. It is the ILECs who have intentionally sought, and largely succeeded, in limiting the customers that CLECs can profitably serve. As a direct result of the ILECs' actions, CLECs have been able only to compete for the business of large, geographically-dense corporate customers.

When certain CLECs capitalized on the ILECs' greed by developing a niche market based on signing up locally-based ISPs as end user customers, the ILECs now seek to eliminate this final revenue stream. A mandatory bill and keep requirement will leave CLECs completely uncompensated for the service they provide, and take away the viability of this one remaining addressable market.

Mandatory "bill and keep" would provide fewer incentives for the ILECs to deploy advanced services and new technologies

Because reciprocal compensation is tied directly to the ILECs' alleged costs of providing transport and termination, it provides important incentives for the ILECs to install and utilize more efficient, and hence less costly, network equipment. Thus, abandoning recip comp in favor of a mandatory "bill and keep" regime – coupled with the likely negative impact on local competition -- will take away these important incentives, and give the ILECs even less reason to upgrade the outmoded portions of their networks.

Mandatory "bill and keep" would accelerate the disintegration of a viable CLEC industry

Verizon argues that a transition to bill and keep would not harm CLECs or their shareholders because the CLECs and their analysts have not factored reciprocal compensation revenues into their accounting systems and stock valuations (Verizon Ex Parte Letter, CC Docket No. 99-68, dated 11/1/00).

Of course, many of the CLECs have been forced into this precarious financial position precisely because the ILECs are contesting state commission rulings, and otherwise have refused to pay the reciprocal compensation revenues that are owed. In other words, the Commission is being urged to note the result of the ILECs' own intransigence and lack of good faith – the CLECs must write down revenue and avoid reciprocal compensation exposure -- as a positive reason for adopting mandatory bill and keep.

Mandatory "bill and keep" would accelerate the disintegration of a viable CLEC industry

The simple truth is that, as numerous news stories attest, the CLEC industry is in dire straits. As one indicia -- recent stock market data for selected telecom companies -- reveals, the CLECs and other competitive providers have lost a tremendous portion of their value over the past few months. The average industry-wide stock price, as a percentage of the 52-week high during the period ending 11/20/00, is as follows:

RBOCs:	58-97%
Wireless providers:	37-50%
IXCs:	25-32%
CLECs:	5-20%
Data CLECs:	3-5%

While this snapshot does not tell the whole story, it does provide a pointed response to the ILECs' disingenuous statements about the relative health of the CLEC industry.

Mandatory bill and keep would leave the ISPs with no competitive alternatives to the ILECs

One of the ILECs' unstated intentions (besides securing a cost-free ride on the CLECs' networks) is to drive the CLECs out of the local market, and lock up the ISPs as customers -- or perhaps eliminate the ISPs as competitors altogether. It is instructive that, in many cases, ISPs sought out the CLECs beginning in 1996 because the ISPs were interested in higher service quality and lower prices than they were receiving from the ILECs.

Adopting a mandatory bill and keep policy would reward the ILECs for ignoring and losing ISPs as customers in the first place, and would relegate the ISPs to a choice-free scenario of using the ILECs or nobody. In fact, given the ILECs' openly-acknowledged poor performance -- deliberate or otherwise -- in serving ISPs prior to the advent of competition, it is likely that the ILECs, as the sole remaining terminators of traffic, would cause tremendous damage to the ISP market.

Mandatory "bill and keep" limited only to ISP-bound traffic, or to all local traffic, would be arbitrary and capricious

The Commission long has recognized that the ILECs incur actual economic costs for originating, transporting, and terminating traffic on behalf of interexchange carriers.

Section 202(a) of the Communications Act of 1934, as amended, requires nondiscriminatory practices and charges for "like" services.

In the Local Competition Order, the FCC concluded that:

Telephone exchange providers and exchange access providers "us[e] essentially the same equipment to transmit and route traffic...." (para. 185).

"The facilities used to provide exchange access services are the same as those used to provide local exchange services." (para. 363).

"We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge." (para. 1033).

Thus, any proposal requiring bill and keep only for ISP traffic between carriers, or local traffic between carriers, must also require the ILECs not to recover costs incurred for transporting and terminating traffic on behalf of interexchange carriers.

Mandatory "bill and keep" limited only to ISP-bound traffic, or to all local traffic, would be arbitrary and capricious

The Commission long has recognized that the ILECs incur actual economic costs for originating, transporting, and terminating traffic on behalf of their own end user customers.

In the Local Competition Order, the Commission found that:

> "transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport of termination of calls on a carrier's own network." (para. 1054).

Thus, any proposal requiring bill and keep only for ISP traffic between carriers, or local traffic between carriers, must also require the ILECs not to recover costs incurred for transporting and terminating traffic on their own networks on behalf of their own end user customers.